LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 30 1961
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 458.

EMPIRE STATE EXPRESS, INC.,
Petitioner.

vs.

TRUCK DRIVERS AND HELPERS LOCAL UNION No. 728, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI.

W. EDWARD SWINSON,
Columbus, Georgia,
ROBERT T. THOMPSON,
Atlanta, Georgia,
Counsel for Petitioner.

E. L. MENDENHALL, INC., 1308 Oak Street, Kansas City 6, Mo., HArrison 1-3030

INDEX

Index I
List of Authorities I
Beginning of Reply Brief 1

I. Opinion Below 1-2

II. Argument in Reply 2
(1) Viness as agent of Petitioner 2
(2) Did Service Drivers know for whom they worked 2-3
(3) Discussion of Local 24 v. NLRB, 266 F.2d 675 3-5
(4) Is intent of Statute now clear 5-6
(5) Usurpation of functions of jury 6-10
(6) Not one but two strikes 10-12
(7) Local 728 Teamsters and Empire State, 116 NLRB 615 and Board history 12
(8) Supervision by this Court 12-13
(9) Importance of Deciding 13
(10) Decision by District Judge Sloan 13-14

III. Conclusion 14
Signatures of Attorneys for Petitioner 15
Certificate of Service 15-16

TABLE OF AUTHORITIES

Cases Cited

Opinion Below 293 F.2d Adv. Sh. No. 3. pp. 414-423 1-2
Local No. 24 v. *NLRB*, 1958, 266 F.2d 675 3-5
Local 761 v. *NLRB*, 6 L. Ed. 2d Adv. Sh., Vol. 4, page 592, 81 S. Ct. 1285 5-12
Local 728 Teamsters and Empire State No. 10-CC-131, 116 NLRB 615 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 458.

EMPIRE STATE EXPRESS, INC.,
Petitioner.

vs.

TRUCK DRIVERS AND HELPERS LOCAL UNION No. 728, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI.

Petitioner, Empire State Express, Inc., believes it to be necessary and perhaps useful to this Court to file this Reply Brief.

I. OPINION BELOW.

Since the opinion of the Court below (Appendix A, pp. A1-A18 of the Petition) had not been published at the

time the Petition was filed, but now is published, we supply the information: 293 F.2d Advance Sheet No. 3, pp. 414-423.

II. ARGUMENT IN REPLY.

1. On page 9 of the Brief in Opposition, Respondent makes the statement that "there was uncontradicted testimony that Mr. Viness acted as Petitioner's agent in regard to Petitioner's labor relations" (R. 712, 713). Cook, President of Respondent, and the witness testifying, contradicted his own testimony in that respect on Cross-Examination. See Petition for Certiorari, pp. 30-36. In this regard, where is there a good faith basis for the statement or argument made by Respondent? Respondent here is attempting to assert that the "uncontradicted testimony" shows Viness was an agent of Petitioner in the field of labor relations, when the evidence does not establish that fact, uncontradicted or otherwise. If that one fact were true and Viness was acting as a member of the partnership of Service Cartage Company, thus making Service such an agent for Petitioner, Petitioner would be compelled to admit that Petitioner and Service were not two "persons" or two "employers" within the meaning of the Act. The contradiction existing in the Direct Examination and the Cross-Examination of Cook, standing alone, justified the District Judge in submitting the cause to the jury.

2. On page 10 of the Brief in Opposition, Respondent states that the "local drivers" did not know they were working for or employed by Service, but thought they worked for Petitioner. In that statement, Respondent is not referring to the five over-the-road drivers who worked for Petitioner until August 26, 1955, but to employees of

Service Cartage Company. The first witness, Tate, whose testimony appears in the Record pp. 695-701 testified (Rec. 696):

> "Q. Bishop, where are you employed? A. Well, I work, I guess it is Empire State.
>
> "Q. Well, who pays you? A. Jack Viness pays me."

Petitioner invites this Court to read the remaining testimony of Tate (Rec. pp. 695-701), and requests this Court then to decide if that testimony amounts to "enmeshment" of the labor relations of the employees of Petitioner and Service, or that the employees of Petitioner and of Service were "so intertwined with respect to employment" that Service "was not protected" by the Act as another "person" and another "employer." Does not the answer "Jack Viness pays me" mean unqualifiedly that Tate was an employee of Service? The second witness for Respondent, Malloy, who also worked for Service, testified he knew he worked for Service (and not Petitioner) about two weeks after he began to work on August 1, 1955, when he received his first pay check from Service: but the testimony in that respect is not clear. Also it is a fact not to be disputed that Malloy received his first pay from Service sometime before the five over-the-road drivers working for Petitioner quit work on August 26, 1955. We invite this Court to read the testimony of Malloy (Rec. pp. 702-706); and it will be seen that Malloy knew that Petitioner and Service were, without regard to legal technicalities, two separate employers.

3. On pages 17 and 18 of the Brief in Opposition, Respondent cites *Local No. 24* v. *NLRB*, 1958, 266 F.2d 675, 680, and quotes from the opinion of Chief Judge Prettyman. In *Local No. 24* v. *NLRB*, *supra*, Judge Prettyman

was faced with real and truly complicated "enmeshment" and "intertwinement" and not as in this case sham, or trivial or lawyer-built "enmeshment" or "intertwinement." In Local No. 24, Judge Prettyman, because the relationship between the control of the employees of the purported primary employer and of the purported secondary employer, and the control of the labor relations of both groups of employees by the purported primary employer, could truthfully take the position that the relationship of independent contractor did not exist between the two within the meaning of this Act. And Judge Prettyman was justified in holding "We need not devise a new word to describe the relationship here depicted." We call this Court's attention to the fact that when any of our courts have looked through form to substance, the pattern followed has been to hold that form will be ignored and substance adopted, and our courts generally do not regard it necessary to define the adopted substance. The whole point is that "form" is disregarded.

The opinion of Judge Prettyman is soundly based on the true test: Is the secondary employer, because of his relations with his own employees and because of his relations with the employees of the primary employer, truly and directly interested in the labor dispute between the primary employer and his employees, so that the secondary employer may not be a neutral to the labor dispute?

In Local No. 24, because of the language of the independent contractor agreements, and the operation practices followed with regard to employees of the primary employer and many similar operation practices followed with regard to employees of the secondary employer, it was impossible to draw a line or to fix a point where it could be reasonably said the interest of the secondary employer in the labor dispute began or ended. Hence, the

interest in the labor dispute was determined to extend to the point where the secondary employer was declared not to be a "neutral" employer. In this case now before this Court, there is a difference as night from day. The relationship between Petitioner and Service is simple not complex. It comes to this: are the few, simple and clear facts relied on by Respondent regarding the relationship between Petitioner, a corporation, and Service, a partnership, sufficient upon which to base a sound conclusion that Service was interested in the labor dispute between Petitioner and Respondent? We assert that a thorough understanding of the facts will dissipate and destroy such a conclusion.

4. On page 19 of the Brief in Opposition, Respondent asks the question:

> "Is the intent of the statute not clear by this time?"

The answer is "Yes, the 'intent' is clear, but the application of the intention of the statute is not." That is true since this Court on May 29, 1961, in *Local 761, E.R.&M. Workers,* 6 L. Ed. 2d Adv. Sheet, Vol. 4, page 592. 81 S. Ct. 1285, published its opinion. It is now clear that the language of the statute "cannot be literally applied." It is clear that a *bona fide* relationship of independent contractor on the part of the secondary employer with the primary employer does not deny to the secondary employer the protection and benefit of the Act against a boycott prohibited by the Act. It is not yet entirely clear as to the character of the interest which must be possessed by the secondary employer to qualify the secondary employer for the benefit and protection of the Act or to disqualify the secondary employer for such protection. Is the "interest" referred to an interest in the labor dispute,

or an interest in a common endeavor or common business venture? This question needs to be answered by this Court. We contend and assert that the interest held by the secondary employer must be an "interest" in the labor dispute. If this Court is of that view, then, since the contract between Petitioner and Service created a *bona fide* relationship of independent contractor (and no single term of the contract is disputed), the question is, should the credible and uncontradicted testimony relied upon by Respondent disqualify Service as another "person" and another "employer" from Petitioner? We say that the position of Respondent travels from the absurd to the ridiculous.

5. Attorneys for Petitioner stated in the Petition and now reiterate that the Fifth Circuit "usurped the function of the jury." We did not make any insinuations, improper or otherwise, against the Judges composing the panel of the Lower Court; nor did we attack, or detract from, the dignity of that Court. We simply acted and frankly said what we thought was demanded because of what in our opinion was a serious or large error as distinguished from an error we thought to be slight or small. Usurpation of the function of a jury is fundamental, whether or not it innocently or wilfully occurs, and deserves tough hard language and condemnation. In the case at bar, we believe it occurred; and that it is present on the most vital point in the action, the same being: Was or was not Service an agent of Petitioner in regard to Petitioner's labor relations with the employees of Petitioner? Respondent contended and contends Service was an agent of Petitioner of the kind and to the extent to disqualify Service from the protection of the Act. Petitioner on the other hand contended and contends that proof of such agency was entirely insufficient.

Petitioner has pointed out above and in the argument supporting the Petition, that the testimony of Cook, President of Respondent, does not justify the conclusion of that sort of agency. In addition, the testimony of Mathis, Secretary-Treasurer of Respondent, shows that Mathis dealt with Rowlenson and Livingston, officers of Petitioner, and not with Service or Viness, with regard to representing the employees of Petitioner. See Rec., p. 625, where Mathis stated "* * * I advised him (Rowlenson) I would send the contracts (union) to his office in Columbus for signature;" and see Rec., pp. 628-630 where Mathis testified about the meeting in Columbus, regarding representation of the employees of Petitioner by Respondent, between Mathis representing Respondent and Livingston, Rowlenson and Swinson representing Petitioner. Also, Swinson's testimony in regard to that meeting in Columbus is set forth in the Petition, pp. 14-17. But more to the point, Mathis testified on direct and on cross-examination that Rowlenson in Atlanta told him that (Direct, Rec., p. 625):

> "He then advised me that Jack Viness would be his agent in Atlanta, and asked if it was agreeable with me. I said yes, that we had dealt with Jack Viness for a number of years and knew him well."

To the same effect Mathis testified on cross-examination (Rec., pp. 663-664), and also testified he asked Livingston and Rowlenson to sign the two union contracts covering all employees of Petitioner (Rec., p. 664).

It will be noted that Mathis did not testify that Rowlenson or Livingston told him that "Viness was to be the agent" of Petitioner in Atlanta in charge of the labor relations of Petitioner with its employees. Mathis used the word "agent" without further explanation or qualification. In that regard, Respondent contended that Mathis'

testimony meant that Viness was to act as the "agent" of Petitioner in labor relations or was to act generally as an agent of Petitioner, by whose acts Petitioner would be bound; and Petitioner contended that the meaning of the term "agent" by Mathis meant that Service and Viness were to represent Petitioner in Atlanta as an independent contractor in the cartage business, and not generally as an agent or as an agent in charge of the labor relations, or any part thereof, of Petitioner. Here again, there was controversy as to a factual situation, which justified the District Judge in calling upon the jury to decide what the true situation was with regard to agency.

Moreover, and to cap it all, Viness testified (Rec., p. 415):

> "* * * I asked him (Johnson, an agent of Respondent) why he was going to strike me (Service Cartage Co.) and he said because I represented Empire State Express (Petitioner), and I told him I had nothing to do with Empire's labor disputes and he (Johnson) said, well, nevertheless, at 10:30 we are going to strike you. It turned out he struck me at ten o'clock instead of ten-thirty."

The foregoing testimony of Viness is undisputed; it is contradictory to the testimony of Mathis, and conflicts with the meaning Respondent has attempted to add to the Mathis testimony as to Viness being an agent of Petitioner. The District Judge submitted that conflict and contradiction in the testimony to the jury, to determine whether Service was an agent generally for Petitioner or as an agent for the labor relations of Petitioner.

The Fifth Circuit also disregarded the cross-examination of both Cook and Mathis by which Cook and Mathis were each impeached, entitling petitioner to have the cause

submitted to the jury (Cook, Rec., pp. 723-726; Mathis, Rec., pp. 664-678).

To the minds of Attorneys for Petitioner, the fact that the Fifth Circuit Court disregarded or ignored the conflicts and contradictions referred to above, and decided that the District Judge should have directed a verdict clearly demonstrates that the Lower Court did usurp the functions of the jury.

True it is, that Attorneys for Petitioner in the Petition, made the statements quoted on pages 20 and 21 of Respondent's Brief in Opposition, but, without further explanation, we stand upon the following statement made by Attorneys for Petitioner and quoted on page 4 of the Petition for Certiorari:

> "There were controverted questions of fact, and Petitioner and Respondent placed different interpretations on proven facts, all submitted to the jury for verdict; but nevertheless, the lower Court usurped the function of the jury in passing on such issues * * *."

True it also is, that Attorneys for Petitioner, at the close of the testimony, made a motion for directed verdict on liability or the boycott issue alone, with the question of damages to be left to the jury, and in the language quoted at the top of page 22 of Respondent's Brief. The District Judge overruled that Motion, and submitted the whole cause to the jury. But the District Judge said that, while the Motion had strong appeal, "* * * I'm simply saying that the wise thing to do at this moment is to let the jury pass upon that question."

But more important to the present discussion, Swinson, an Attorney for Respondent, acquiesced in the unfavorable ruling made on the Motion by the District Judge, in the following language:

"I'm inclined to think Your Honor is correct, if that remark is necessary to the record."

(For Motion and remarks of Attorneys, see Rec., pp. 734-744.)

Certainly, it is not unfair to assert now that Swinson was cognizant of the controversy existing in the testimony and between Petitioner and Respondent which required the District Judge to submit the boycott and liability question to the jury.

How can Respondent legitimately and soundly argue in effect that Petitioner is estopped from taking the position in this Court that, in regard to boycott, there were no controverted questions of fact to be passed on by the jury?

And again, with all due respect, we ask, why did the Fifth Circuit overlook or ignore the controversies clearly amounting to jury questions pointed out above, and decide there was no prohibited boycott? What the lower Court did do in arriving at that result was to select a few items or parts of the testimony supporting its opinion and judgment while disregarding or ignoring the preponderance of the testimony to the contrary, thus refusing to look at the evidence as a whole and attempting to give weighted balance thereto.

6. On page 26 of the Brief in Opposition, Respondent made the old, and as far as this action is concerned, the time-worn argument (accepted and followed by the Trial Examiner and by the dissenting member of the NLRB, but rejected by the NLRB decision, No. 10-CC-131, 116 NLRB 615, and clasped again to the breast of the Lower Court in its opinion), that "the strike * * * began" on August 26, 1955 "when the drivers refused to drive," and did not begin on September 13, 1955, when the picket line

was established and the boycott, if any, began to be committed.

Suppose we lay this argument at rest. If when the drivers, being intoxicated, refused to drive the trucks of Petitioner on August 26, 1955, and never returned to work for Petitioner, that amounted to a strike on August 26 and such strike continued thereafter (and for this proceeding that this Petitioner does not deny), then, there were two strikes beginning on separate and different dates: the first on August 26 and the second on September 13, 1955. The second strike was not a strike of the employees of Petitioner; it was a strike induced, encouraged and ordered by Respondent of employees of Service Cartage Company to compel Service to cease doing business with Petitioner and others; and this strike alone, by itself and without regard to what happened prior to September 13 amounted to a prohibited boycott under the Act, unless Service was and is to be disqualified as another "person" or another "employer" under the Act. Conclusive and uncontradicted proof of this position is provided by the statement of Johnson, an agent of Respondent, made to Viness of Service on the morning of September 13, 1955, when the employees of Service struck and formed the picket lines. Johnson, after being told that neither Service nor Viness "had" anything "to do with Empire's labor disputes," said "* * * nevertheless, at 10:30 we are going to strike you (Service)."

Sometimes, it is very hard to make the truth appear. In recent years and in many fields, time and time again it has been demonstrated that a fallacious statement or argument, rigidly and persistently adhered to on all occasions, has blanked out and overridden the truth. The NLRB, with what we believe to be sound reason and logic, refused to let that occur. And while we think this did happen in

the Fifth Circuit, we find ourselves with strong and confident faith that this Court will refuse to confirm the injustice, if this Court should believe that Petitioner is correct.

7. While NLRB case *Local 728, Teamsters and Empire State*, No. 10-CC-131, 116 NLRB 615, is not cited in this Court's May 29, 1961, opinion in *Local 761* v. *NLRB*, 6 L.Ed.2d Adv. Sheet No. 4, page 592, Attorneys for Petitioner believe the decision in *Local 728, supra*, to be one of the long line of NLRB decisions which formed the developing change in the views of the Board described by this Court in Local 761, *supra;* particularly with regard to a strike on premises commonly occupied and used by several employers, and with regard to strike signs which do not fully make clear the exact employer or employers against whom the strike is directed.

8. With respect to the power of "supervision" residing in this Court to "supervise," when it is deemed appropriate by this Court, the judgment and orders of a Circuit Court, Attorneys for Petitioner wish to add the following.

If "usurpation of the functions of the jury" has been established to the point where an injustice has been done Petitioner, in that Petitioner was and is entitled to have a jury pass on the boycott question, and that the Lower Court has denied, then this Court may order that the power of "supervision" will be exercised.

The references made in the Petition for Certiorari by Attorneys for Petitioner with respect to the comments of the Fifth Circuit on the Charge to the Jury delivered by the District Judge, and to the direction to grant the Motion for judgment notwithstanding verdict were intended to have no more effect than to indicate "unusual depar-

tures," and to emphasize the overall conclusion that the "usurpation" together with such "departures" had worked an injustice upon Petitioner.

9. Attorneys for Petitioner are not requesting or urging this Court "to place a strait-jacket of legal formulae" in the announcement of a new rule or guide for the future as argued by Respondent's Brief, pages 16-19.

We are respectfully suggesting that it would be beneficial to the federal courts and the NLRB to have a "neutral employer" or an "unconcerned employer" defined in a broad manner with room for future change, and particularly with respect to the kind of interest such an employer must have to qualify that employer to be regarded as another "person" or another "employer" from the primary employer. From our study and reflection, we believe that "interest" should be confined to a true or common interest with the primary employer in the labor dispute, and not be directed against a common venture or common business interest in which both employers may be said to be interested, when as a matter of truth and fact the secondary employer may be truthfully said to have no real interest in the labor dispute between the primary employer and the employees of the primary employer.

10. On pages 29 and 30 of the Brief in Opposition, Respondent quotes from the opinion of Judge Sloan in the injunction case brought by the Board, under Section 10(1) of the Act against Respondent, stating that if he (Judge Sloan) were "free to make its own determination of this controverted issue, it (he) would be inclined" to rule that

Service was "an ally of Empire" or "was not such a disinterested neutral" * * * "as to come within the protection of the Act."

Firstly, Judge Sloan was not required by the law to try the issue on the merits, but only to decide if there was "reasonable cause to believe" a boycott may have been committed.

Secondly, Judge Sloan did not hear the evidence introduced before the NLRB; and the Board did decide that Service was not "an ally" of Petitioner but was a "neutral employer."

Thirdly, Judge Sloan did not hear the evidence in this cause in the District Court, and the District Judge certainly thought the Petitioner had made out a *prima facie* case and was entitled to have the boycott question decided by a jury.

Fourthly, the Fifth Circuit Court knew Judge Sloan's statement to be what it was, pure dicta without any basis of evidence to support it, and the Fifth Circuit did not cite or rely on the unsupported opinion of Judge Sloan.

III. CONCLUSION.

Attorneys for Petitioner will greatly appreciate the courtesy from this Court of receiving and considering this Brief in reply to the Brief in Opposition of Respondent in connection with making the decision as to whether or not to grant the Writ of Certiorari in this proceeding.

This 25th day of October, 1961.

Respectfully submitted,

Addresses:

1214 Third Avenue
P. O. Box 548,
Columbus, Georgia.
Rhodes-Haverty Building,
Atlanta, Georgia.

W. EDWARD SWINSON,

ROBERT T. THOMPSON,
Counsel for Petitioner

SWINSON, ELLIOTT & SCHLOTH,
P. O. Box 548,
Columbus, Georgia.
Of Counsel for Petitioner

WILSON, BRANCH & BARWICK,
Rhodes-Haverty Building,
Atlanta, Georgia,
Of Counsel for Petitioner

CERTIFICATE OF SERVICE.

STATE OF GEORGIA,
COUNTY OF MUSCOGEE.

I, W. Edward Swinson, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have this day served Respondent in the captioned case with the foregoing Reply Brief responding to Respondent's Brief in Opposition to the Petition for Writ of Certiorari, by mailing, with proper postage affixed, two copies of said printed Reply Brief to Counsel for Respondent,

Messrs. Poole, Pearce & Hall, John S. Patton, and William B. Paul, 1642 Bank of Georgia Building, Atlanta 3, Georgia.

This 28 day of Oct. , 1961.

W. Edward Swinson

W. EDWARD SWINSON,
Of Counsel for Petitioner.

Address:

1214 Third Avenue,
P. O. Box 548,
Columbus, Georgia